84-99

No.

IN THE

Supreme Court of the United States

October Term 1984

PHIN COHEN,

Petitioner,

v.

PRESIDENT AND FELLOWS OF HARVARD UNIVERSITY, HOWARD H. HIATT AND FREDERICK J. STARE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether this Court should resolve the conflict among the Circuits as to whether an appellant may assert legal arguments that were not presented to the district court to reverse a judgment issued prior to trial if (a) the issues are purely legal, (b) the failure to assert them below is excusable, and (c) no new questions of fact are presented.

2. Whether this Court's recent decision in *Dixson* v. *United States*, 104 S.Ct. 1172 (1984) establishes that a scientific researcher administering federal grant funds is a person holding a "trust or place of confidence under the United States" and is therefore protected by 42 U.S.C. § 1985(1).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Dr. Phin Cohen hereby petitions for issuance of a writ of certiorari to review the decision and judgment of the Court of Appeals for the First Circuit in *Cohen* v. *President and Fellows of Harvard University, et al.*, No. 83-1670.

OPINIONS BELOW

The decision of the court of appeals (Pet. App. A, pp. 1a-3a, *infra*), is not yet reported. The opinion of the district court is reported at 568 F. Supp. 658 (Pet. App. B, pp. 5a-10a, *infra*).

JURISDICTION

The decision of the court of appeals was issued on March 13, 1984. On April 20, 1984, the court of appeals denied a timely petition for rehearing and suggestion for rehearing *en banc* (Pet. App. C, p. 11a, *infra*). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1653 of the Judicial Code, 28 U.S.C. § 1653, provides as follows:

> Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

Section 1985(1) of Title 42, enacted as part of the Civil Rights Act of 1871, provides in pertinent part:

> (1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust or place of confidence under the United States, or from discharging any duties thereof; . . . or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties; . . .
>
> * * *
>
> [I]n any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT

Petitioner served for six years on the faculty of the Harvard School of Public Health ("HSPH"), until he began complaining that Harvard was mishandling federal grant funds, at which time his faculty appointment was not renewed. The federal government investigated the charges petitioner had made and, as a result of a broadened inquiry, it recovered from Harvard almost $5 million of research funds that were improperly managed. *See* " Harvard to Repay Government $4.6 M," *Boston Globe* (Oct. 29, 1983); "U.S. To Ask Harvard To Return More Grant Money," *Boston Globe* (Feb. 19, 1984) (Pet. App. D, pp. 12a-13a, *infra*). Federal auditors have stated that this recovery from Harvard is the "largest single repayment from a university" under federal grant programs. *See* "Harvard to Pay Up Record Amount," 306 *Nature* 108 (Nov. 10, 1983).

1. The Complaint

Dr. Cohen filed this lawsuit on April 1, 1977, alleging that, as retribution for his complaints of mismanagement and to intimidate him from further reporting Harvard's misuse of federal funds, Harvard failed to honor its commitment to reappoint him to the HSPH faculty. During his years at Harvard, Dr. Cohen had been the "principal investigator" for research projects on which Harvard was the "grantee." Under federal regulations, Dr. Cohen was responsible for the "scientific and technical direction" of the federally-financed research, while Harvard was "the responsible legal entity for the grant." 42 C.F.R. § 52.2 (1976). Harvard was bound to comply with the federal requirements for financial management, including the charging of allowable costs. Both Dr. Cohen and Harvard were required to sign the federal grant applications and certify their willingness to comply with federal regulations. Both Dr. Cohen and Harvard were named in the grant awards, and both, according to the National Institutes of Health (NIH), were responsible for proper administration of the federal funds. NIH, "Grants for Research Projects: Policy Statement," p. 5 (July 1, 1972). Dr. Cohen's amended complaint alleged that

the financial connections between Harvard and the federal government made available to petitioner a constitutional remedy directly against Harvard for the deprivation of his First and Fifth Amendment rights related to the failure to reappoint him.

2. The District Court Decision

After substantial discovery, Harvard filed a motion for summary judgment in July 1982, arguing that there was insufficient government involvement in Dr. Cohen's appointment to permit a federal constitutional remedy against Harvard. Petitioner also filed a motion *in limine* seeking resolution of that question. Just three days before Dr. Cohen's motion was filed, this Court handed down two decisions limiting the circumstances in which "state action" may be found under 42 U.S.C. § 1983. *See Blum* v. *Yaretsky*, 457 U.S. 991 (1982); *Rendell-Baker* v. *Kohn*, 457 U.S. 830 (1982).

The district court granted Harvard's motion for summary judgment, describing the "key factual issue" as "whether the challenged activity of Harvard and the other defendants can be considered actions of the federal government." Pet. App. B, p. 6a, *infra*. After noting that the test for "federal action" is the same as the "state action" standards under 42 U.S.C. § 1983, the district court applied the *Blum* and *Rendell-Baker* decisions. The district court concluded that Harvard's failure to reappoint Dr. Cohen was not "compelled or influenced by the government," and that the federal government and Harvard were not so intertwined that Harvard's actions might be attributed to the government. Pet. App. B, p. 8a, *infra*. The district court also held that funding of scientific research was not traditionally the "exclusive domain of government," so that Harvard's actions need not be seen as federal action. Pet. App. B, p. 10a, *infra*.

3. In the Court of Appeals

Petitioner sought to overcome this Court's then-recent rulings in *Blum* and *Rendell-Baker* on his appeal. Without disturbing any of the extensive factual allegations of his

amended complaint, petitioner's appellate counsel presented three arguments for federal jurisdiction to the court of appeals:

> *First*, petitioner argued that the district court failed to recognize that Harvard's non-renewal of Dr. Cohen's appointment was federal action because it had the necessary consequence of cutting off federal funds which had been earmarked by a federal agency for his scientific research. Although Dr. Cohen could attempt to gain renewed federal funding through a new application from a different grantee institution, Harvard's unilateral control over his ability to continue existing federal funding relationships turned Harvard's actions into the *de facto* action of a federal agency.
>
> *Second*, Dr. Cohen argued that he may recover damages from Harvard under Section 2 of the Civil Rights Act of 1871, 42 U.S.C. § 1985(1), which protects those who hold a federal "trust or place of confidence under the United States" against conspiracies to intimidate them from discharging their duties. Under this theory, Harvard and its officers conspired to prevent Dr. Cohen from executing obligations he held under federal regulations as a "principal investigator."
>
> *Third*, Dr. Cohen maintained that he had an implied civil cause of action under federal criminal statutes protecting witnesses in potential federal proceedings against private punishment and intimidation. *See* 18 U.S.C. § 1512. Under this theory, the defendants were taking action to prevent him from providing information in federal administrative proceedings.

In presenting these arguments, petitioner stressed that Section 1653 of Title 28 U.S.C. directs that "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts" and cited numerous authorities holding that purely legal arguments may be heard for the first time on appeal when it is in the interest of justice to do so.

4. The Court of Appeals Decision

In a four-paragraph opinion, the court of appeals affirmed the district court, rejecting summarily the issues argued on appeal without even addressing 28 U.S.C. § 1653 or the case law cited by petitioner. After stating that it did not believe "that a new game could be started at this date," the court of appeals said it had looked at petitioner's arguments "to see whether they are so compelling that to foreclose their consideration would abet a gross miscarriage of justice." Pet. App. A, p. 3a, *infra*. The court of appeals then dismissed in a single sentence each of petitioner's legal arguments, concluding, "Each theory would face an uphill battle. None can be said to be compelling." *Id.*

REASONS FOR GRANTING THE WRIT

1. **There is substantial conflict among the Circuit Courts as to whether to permit new legal arguments to be made by an appellant when no new facts are alleged and the case has not been tried.**

This case presents an important issue that always arises, in the first instance, in a court of appeals: May an appellant obtain reversal of a district court judgment issued prior to trial on a pure issue of law which he has not presented to the district court but which involves no new facts and which has been fully briefed and argued in the court of appeals? Although it may appear unfair to a district judge to reverse his decision on a question of law that has never been presented to him, the personal feelings of the trial judge are not the criterion by which to determine legal rights. Particularly when—as is true in this case—the failure to present alternative legal arguments in the trial court is understandable and excusable in light of the then-current state of the law, no reason of judicial economy warrants closing the door to a legal contention simply because it was not urged in the trial court.

The decision below places the First Circuit at one extreme among the Circuit Courts which have considered when it is appropriate to consider a new legal argument first made in the appellate court by an appellant. The court below acknowledged that there was an explanation for petitioner's exclusive reliance on the legal theory initially asserted—*i.e.*, that the particular legal theory was, at the time the complaint was filed, "arguable" in light of then-ongoing litigation. See Pet. App. A, p. 2a, *infra*. Although the original theory was not foreclosed until five years after the suit was filed, petitioner is now barred from raising alternative legal theories in federal court because he understandably relied on a legal proposition that then appeared to be tenable.

Other Circuits, as well as this Court, have permitted new legal arguments to be asserted by an appellant to reverse a judgment below [1] with far less justification than existed here for the failure to present those arguments to the district court. In *Roofing & Sheet Metal Services, Inc.* v. *La Quinta Motor Inns, Inc.*, 689 F.2d 982 (11th Cir. 1982), for example, summary judgment was reversed on a legal argument not presented to the trial court. The court of appeals indicated that it would hear a new argument "if it involves a pure question of law, and if refusal to consider it would result in a miscarriage of justice." 689 F.2d at 990. The court went on to observe that "[a]ny wrong result resting on the erroneous application of legal principles is a miscarriage of justice in some degree," and it held that since "[r]emand after reversal of summary judgment does not seriously impair judicial economy," it would ordinarily consider an appellant's new legal arguments attacking the grant of summary judgment. The decision of the district court in this case granted summary judgment to the defendants. Consequently, the decision below conflicts squarely with that of the Fifth Circuit.

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[1] The unfairness of the First Circuit's rule is further demonstrated by comparing the right of an *appellee* to assert *any* argument—whether or not made below—to sustain the judgment of a district court. *See, e.g., California Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 71 (1974); *Southard* v. *Southard*, 305 F.2d 730, 732 (2d Cir. 1962).

Similar policies have been adopted by several other Circuits. *See Commodity Futures Trading Commission* v. *Co Petro Marketing Group, Inc.*, 680 F.2d 573, 581 (9th Cir. 1982) ("It is well-settled in this circuit that where the new issue is purely a legal one, the injection of which would not have caused the parties to develop new or different facts, it is proper to resolve it on appeal"); *Vintero Corp.* v. *Corporacion Venezolana de Fomento*, 675 F.2d 513, 515 (2d Cir. 1982) ("Arguments made on appeal need not be identical to those made below, however, if the elements of the claim were set forth and additional findings of fact are not required"); *Martinez* v. *Mathews*, 544 F.2d 1233, 1237 (5th Cir. 1976) (reviewing issue raised for first time on appeal since it involves "a pure question of law" and refusal to consider it "would result in a miscarriage of justice").

The practice in this Court has also conflicted with the attitude of the First Circuit. As recently as June 18, 1984, this Court ruled that it is justifiable to consider legal issues, even if not argued below, if the factual predicates for the new claims have been established. In *Capital Cities Cable, Inc.* v. *Crisp*, 52 U.S.L.W. 4803, 4805 (1984), this Court said (citations omitted):

> Although we do not ordinarily consider questions not specifically passed upon by the lower court, this rule is not inflexible, particularly in cases coming, as this one does, from the federal courts. Here, the conflict between Oklahoma and federal law was plainly raised in petitioner's complaint, it was acknowledged by both the District Court and the Court of Appeals, the District Court made findings on all factual issues necessary to resolve this question, and the parties have briefed and argued the question pursuant to our order. Under these circumstances, we see no reason to refrain from addressing the question whether the Oklahoma bar as applied here so conflicts with the federal regulatory framework that it is pre-empted.

See also Youakim v. *Miller*, 425 U.S. 231, 234 (1976); *Singleton* v. *Wulff*, 428 U.S. 106, 121 (1976); *Vance* v. *Terrazas*, 444

U.S. 252, 259, n.5 (1980); *Commissioner* v. *Gordon*, 391 U.S. 83, 95, n.8 (1968).

The rule should be the same in all Circuits and should follow this Court's recent course in the *Capital Cities* case. When a complaint is dismissed prior to trial or when summary judgment is granted, pure questions of law should be presentable in the appellate courts on behalf of both parties, so long as there is no effect on the factual record. It is not fair that petitioner's legal arguments were only grudgingly and fleetingly considered against a "compelling" and "gross miscarriage of justice" standard because his lawsuit was against Harvard and was heard by the First Circuit when the same arguments would have received full consideration had the claim been against Tulane University and heard in the Fifth Circuit.

The procedural issue presented by this petition concerning the authority of courts of appeals is, therefore, more significant than might appear from an examination of the underlying substantive claim. It is important that the Circuits have a uniform standard under which to consider legal claims that have not been argued to the lower courts. Only this Court is in a position to prescribe criteria that the courts of appeals will be obliged to follow.

2. On the basis of this Court's recent decision in *Dixson* v. *United States*, petitioner has a federal claim.

Nine days after the oral argument below, this Court announced its decision in *Dixson* v. *United States*, 104 S. Ct. 1172 (1984). Petitioner advised the court of appeals of the *Dixson* opinion by letter, but the court's decision evinced no consideration of *Dixson*. The decision below is contrary to the decision rendered in *Dixson*, and the judgment of the court of appeals should be reversed on the authority of that case.

Dixson held that two officials of a private, nonprofit corporation who administered federal grant funds could be prosecuted as "public officials" under the federal bribery statute. 18 U.S.C. § 201(a). Petitioner has claimed in this case

that by terminating his relationship with the HSPH, respondents attempted to prevent him from performing duties as a "principal investigator" on federal grants to supervise ongoing research and to be responsible to report Harvard's mishandling of federal funds. That interference violates 42 U.S.C. § 1985(1), which provides a private right of action for "any person . . . holding any office, trust or place of confidence under the United States" against those who conspire to prevent that person from performing his official duties.

Petitioner's argument that he held a "trust or place of confidence" under Section 1985(1) follows closely the reasoning in *Dixson*. In *Dixson*, Section 201(a) applied to any "person acting for or on behalf of the United States," while in this case Section 1985(1) applies to persons holding a "trust or place of confidence under the United States." But this Court noted in *Dixson* that the language of Section 201(a) was inserted during a recodification to replace the words "person holding any place of public trust or profit, or discharging any official function under" the United States. 104 S. Ct. at 1178, n.11. The language of Section 1985(1) is, therefore, equivalent to the *Dixson* language.

Dixson also reviewed the 1962 legislative history of the bribery statute and emphasized that the broad definition of "public official" was maintained despite attempted narrowing in earlier versions of the bill. 104 S. Ct. at 1178. The same observation applies to Section 1985(1). As initially proposed, the provision would have proscribed only conspiracies to resist federal "officers in the discharge of official duty." Cong. Globe, 42d Cong., 1st Sess. 317. A subsequent version, however, applied to conspiracies against persons holding any "office of trust or place of confidence under the United States." *Id.* at 477. The final language reached conspiracies against those "holding any office or trust or place of confidence under the United States." *Id.* at 724. Thus, Section 1985(1) should be given an expansive definition, as was the language of Section 201(a) in *Dixson*.

Moreover, policy considerations strongly support a broad construction of Section 1985(1). As in *Dixson*, the "federal government has a strong and legitimate interest" in permitting redress against those who "misuse . . . government funds" or obstruct individuals who act on behalf of the government. 104 S. Ct. at 1182. Moreover, in this civil case there is no concern that the rule of lenity requires a narrow statutory construction—a concern which was noted by the *Dixson* Court in interpreting the criminal bribery law. 104 S. Ct. at 1177. Indeed, Section 1985(1) is part of this nation's civil rights laws, and, as such, should be given a broad construction by the courts. *See Monell* v. *Department of Social Services*, 436 U.S. 658, 683-687 (1978).

Finally, it is striking that when *Dixson* described responsibilities of the grant administrators in that case, the Court used terms singularly descriptive of petitioner's claim under Section 1985(1). *Dixson* states that "the proper inquiry" is "whether the person occupies a *position of public trust* with official federal responsibilities." 104 S. Ct. at 1180 (emphasis added).[2] And *Dixson* concludes that the officials in that case "held a position of public trust with official federal responsibilities: allocating federal resources, pursuant to complex statutory and regulatory guidelines . . . ." 104 S. Ct. at 1181.

Dr. Cohen was in the same position as the officials in *Dixson*. As a "principal investigator," he held a position of public trust with official federal responsibilities to manage research done with federal grant funds. Dr. Cohen was individually named and selected by federal officials, he was obligated to comply with complex statutory and regulatory guidelines, and his performance was subject to audit by federal investigators. Because *Dixson* means that Dr. Cohen and other principal investigators are "public officials" who may be criminally prosecuted under 18 U.S.C. § 201(a), it also means that they are entitled to the protection of 42 U.S.C. § 1985(1).

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[2] The Court later stated: "To be a public official under Section 201(a), an individual must possess *some degree of official responsibility* for carrying out a federal program or policy." 104 S. Ct. at 1182 (emphasis added).

CONCLUSION

There is a serious conflict among the courts of appeals on the proper treatment of purely legal arguments first raised on appeal that do not require any change in the factual record. Moreover, the *Dixson* decision should be enforced in this case. Consequently, the writ of certiorari should be granted and the judgment of the court of appeals should be reversed.

Respectfully submitted,

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July 19, 1984

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 83-1670

PHIN COHEN, M.D.
Plaintiff, Appellant,

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE, *et al.*
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Joseph L. Tauro, *U.S. District Judge*]

Before
Coffin, *Circuit Judge*
Gignoux,* *Senior District Judge,*
and Zobel,** *District Judge*

Nathan Lewin, with whom *David O. Stewart, Miller, Cassidy, Larroca & Lewin, Albert F. Cullen, Jr., Robert V. Carr*, and *Cullen & Wall* were on brief, for appellant.

George Marshall Moriarty, with whom *Elizabeth Goddard*, and *Ropes & Gray* were on brief, for appellees.

March 13, 1984

PER CURIAM. Appellant, a former assistant professor of nutrition at the Harvard School of Public Health, brought suit almost seven years ago, alleging that Harvard violated his First and Fifth Amendment rights by failing to renew his appoint-

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* Of the District of Maine, sitting by designation.

** Of the District of Massachusetts, sitting by designation.

ment as an assistant professor in retaliation for his complaints about the expenditure of federal grant monies at the Harvard School of Public Health. The next five years were devoted to considerable discovery, after which an amended complaint was filed, adding two state law claims. The parties then joined in a stipulation of facts and submitted to the district court the question of whether there was sufficient federal involvement in the decision not to renew plaintiff's appointment to constitute government action. The court granted defendants' motion for summary judgment and dismissed the complaint. *Cohen* v. *President and Fellows of Harvard College*, 568 F. Supp. 658 (D. Mass. 1983).

This appeal, after the attenuated proceedings below, illustrates the pertinency of the maxim: "Time makes ancient good uncouth." To which we add that time does not necessarily render recent revelation cognizably couth. What has happened here is a changing of the issues with a changing of the guard. Able counsel aggressively represented plaintiff in the district court on a theory of federal involvement based on the receipt by Harvard of federal monies and an alleged connection between plaintiff's complaints about the supposed misuse of such funds and the termination of his employment. However arguable this theory might have been at the outset of this litigation in 1977, it has been clearly foreclosed by such cases as *Blum* v. *Yaretsky*, 457 U.S. 991 (1982), *Rendell-Baker* v. *Kohn*, 457 U.S. 830 (1982), and *Gerena* v. *Puerto Rico Legal Services, Inc.*, 697 F.2d 447 (1st Cir. 1983). Now come able new counsel on appeal, asserting the claims that today seem most viable.

With notable understatement, present counsel explain that "the principal grounds asserted by trial counsel . . . have been affected by recent Supreme Court rulings. Other grounds were not emphasized below but are now presented in this appeal." They are (1) a private claim for damages implied from a federal criminal statute prohibiting obstruction of justice, 18 U.S.C. § 1510; (2) a civil rights claim under 42 U.S.C. § 1985(1) which protects those who hold a federal "trust or place of confidence"; and (3) First and Fifth Amendment

claims, Harvard's decision to terminate plaintiff's appointment now being described as the critical factor in cutting off plaintiff's federal funding and thus as constituting the necessary government action.

None of these theories, claims, or statutes were pleaded, argued, or briefed during the six and one half years when this case lodged in the district court. It is difficult for us to imagine why, in the light of *Johnston* v. *Holiday Inns, Inc.*, 595 F.2d 890 (1st Cir. 1979), and our consistent practice before and since, appellant could feel that a new game could be started at this date.

In fairness to appellant, however, we have read, listened to, and pondered over his new arguments to see whether they are so compelling that to foreclose their consideration would abet a gross miscarriage of justice. The implied "obstruction of justice" right of action for civil damages springs from a single case, involving a different statute, the doctrine having been unenthusiastically noted by the Supreme Court. The civil rights cause of action is predicated on an unusual and expansive reading of "trust or place of confidence." And the "termination of appointment equals termination of federal funding" argument for federal action confronts more than arguably inconsistent stipulations of fact. Each theory would face un uphill battle. None can be said to be compelling.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 83-1670

PHIN COHEN, M.D.
Plaintiff, Appellant,

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE, *et al.*
Defendants, Appellees.

JUDGMENT

Entered: March 13, 1984

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

FRANCIS P. SCIGLIANO
Clerk

APPENDIX B

PHIN COHEN, M.D.
Plaintiff,

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE, *et al.*
Defendants,

Civ. A. No. 77-945-T

United States District Court
D. Massachusetts

[568 F.Supp. 658]

August 4, 1983

MEMORANDUM

The plaintiff, Phin Cohen, is a former assistant professor of nutrition at the Harvard School of Public Health (HSPH). He alleges that Harvard and HSPH violated his rights under the First and Fifth Amendments to the United States Constitution by failing to renew his appointment as an assistant professor. Cohen asserts that his appointment was not renewed in retaliation for his allegations that federal funds were being improperly allocated at Harvard. In addition to Harvard and HSPH, the other named defendants are Howard Hiatt, dean of HSPH, and Frederick Stare, chairman of the department of nutrition at HSPH. In addition to his constitutional claims, Cohen also alleges state law claims in tort and contract.

Defendants have moved for summary judgment on the ground that the decision not to renew Cohen's appointment is not governmental action and, therefore, is not subject to the First and Fifth Amendments. Cohen has moved *in limine* for a determination of the same issue. For the purposes of these motions, the parties have filed a stipulation of facts.

I.

The First and Fifth Amendments apply to actions of the federal government, not those of private individuals. *See Gerena* v. *Puerto Rican Legal Services*, 697 F.2d 447, 449 (1st Cir. 1983). Cohen argues that there is a nexus between the federal government and the defendants sufficient to subject their actions to First and Fifth Amendment scrutiny. Cohen's theory is essentially twofold: (1) Harvard and HSPH were private parties acting under color of federal law, and (2) the connection between Harvard and the federal government is so close that Harvard can be considered as an officer or agent of the federal government.

II.

Cohen's first theory has no legal basis. Although a claim for deprivation of constitutional rights may be made against private parties acting under color of *state* law, 42 U.S.C. § 1983, there is no analogous cause of action against private parties acting under color of *federal* law. *Kelley* v. *Action for Boston Community Development*, 419 F.Supp. 511, 525 (D. Mass. 1976).

III.

This leaves Cohen's contention that Harvard and HSPH were acting as arms of the federal government in deciding not to reappoint him. The key factual issue, then, is whether the challenged activity of Harvard and the other defendants can be considered actions of the federal government.

The question of whether federal action exists is determined by applying the same standards that are used in determining whether state action exists so as to trigger Fourteenth Amendment rights. *Gerena, supra,* at 449. The First Circuit in *Gerena* identified three tests for determining whether a termination of

employment can be fairly attributed to the federal government.[1] First, the government may be held responsible if there is a sufficiently close nexus between the challenged action and the federal government. *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 351, 95 S.Ct. 449, 453-52, 42 L.Ed.2d 477 (1974). As interpreted by the Supreme Court and the First Circuit, this means that there must be a "specific act or actions of the government which in fact motivated the private action." *Gerena, supra,* at 450. The second analysis is the symbiotic relationship test. The actions of a private actor may be attributed to the government, if the government "has so far insinuated itself into a position of interdependence with [the private entity] that it must be recognized as a joint participant in the challenged activity." *Burton* v. *Wilmington Park Authority,* 365 U.S. 715, 725, 81 S.Ct. 856, 861-62, 6 L.Ed.2d 45 (1961).[2] Finally, the public function test provides that private activity is attributable to the government if the private entity exercises "powers traditionally exclusively reserved to the [government]." *Jackson, supra,* 419 U.S. at 352, 95 S.Ct. at 454.

Cohen argues that Harvard's action in not renewing his appointment may be considered government action under each of these tests. He bases this assertion on (a) the volume of federal funds received by HSPH, (b) the fact that Cohen's position and research were federally funded, and (c) the contention that, traditionally, scientific research has been funded exclusively by the federal government.

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[1] These tests were developed by the U.S. Supreme Court in several cases, particularly *Lugar* v. *Edmonson Oil Co.*, 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982); *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982); *Blum* v. *Yaretsky*, 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982); *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974); *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961).

[2] In *Burton*, a private restaurant that discriminated against blacks was located in a public facility, paid rent to the public facility, and its profits were indispensable to the financial success of the government agency. On those facts, the discrimination practiced by the restaurant was attributed to the government.

Cohen became an assistant professor of nutrition on September 1, 1969. His initial appointment and later reappointment were conditioned on his ability to raise funds from outside sources. These funds were raised primarily from the federal government.

Cohen contends that this funding arrangement establishes a nexus between Harvard and the government. Both the First Circuit and the Supreme Court have recently stated, however, that "receipt of government funds does not render the government responsible for a private entity's decisions concerning the use of those funds." *Gerena, supra,* at 450. *See Rendell-Baker* v. *Kohn,* 457 U.S. 830, 839-40, 102 S.Ct. 2764, 2770-71, 23 L.Ed.2d 418 (1982); *Blum* v. *Yaretsky,* 457 U.S. 991, 1010, 102 S.Ct. 2777, 2789, 73 L.Ed.2d 534 (1982). Cohen attempts to distinguish these cases by pointing out that in the present case, he secured his own federal funding, rather than having the private entity secure the federal funding and use it to hire him. This distinction, however, is simply not relevant to the nexus analysis. The above-cited cases focus on whether the challenged action of the private entity was compelled or influenced by the government. There is no evidence that Cohen's employment termination was influenced by the government. The parties' stipulation of facts states:

> Neither the United States of America, nor any department, agency, officer, or employee thereof, took any part in any of the foregoing decisions [relating to Dr. Cohen's employment and nonrenewal by HSPH], nor in any other decision made by Harvard with respect to Dr. Cohen's employment.
>
> . . . .
>
> Specifically, except for the general equal opportunity and nondiscrimination provisions just referred to, the federal government did not impose, and Harvard did not agree to, any restriction on its freedom of choice with respect to decisions or procedures on faculty

> employment in connection with any of the projects on which Dr. Cohen worked while at Harvard.

Stipulation at pp. 5-6.

The stipulation establishes that the federal government did not dictate or take part in Harvard's decision not to renew Cohen's appointment. Under the nexus test, however, Harvard's action cannot be attributed to the goverment.

Moreover, the funding arrangement between the government, Cohen and Harvard contemplates two independent decisions. First, the federal government decides whether to fund Cohen's grant proposal. Second, Harvard decides whether to appoint or reappoint Cohen. If the federal government had decided to cut Cohen's funds and, for that reason, Harvard had terminated him, then one might be able to argue that the termination was dictated by federal action. In the present case, however, Harvard's decision was not based on any cut-off of federal funds. Indeed, the government is authorized to continue funding Cohen at a different institution.[3] Cohen, therefore, is unable to point to any specific "actions of the government which in fact motivated the private action." *Gerena, supra,* at 450.

Cohen also argues that there is such interdependence between him, the government and Harvard that it constitutes a "symbiotic relationship," under which Harvard's action could be attributed to the government. As the First Circuit made clear in *Gerena,* the symbiotic relationship category is very narrow. *Gerena, supra,* at 451. There, as here, the affairs of the private entity were unconnected with the financial success of the government or any government agency. That fact distinguishes the situation here from the symbiotic relationship found by the Supreme Court in *Burton, supra.* Moreover, the government insinuation into a position of interdependence with the private entity that was found in *Burton* is absent here. The funding arrangment involved in this case, therefore, lacks the elements necessary to establish a symbiotic relationship. *See Gerena* at 451; *Blum* v. *Yaretsky, supra,* at 4789.

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[3] *See* Stipulation of Facts at p. 6: ". . . if a principal investigator moves to a different institution, he may obtain the approval of the appropriate federal authorities to a continuation of the grant or contract at his new institution."

Cohen's contention that Harvard's action should be attributed to the government because Harvard "exercises powers traditionally exclusively reserved to the [government]," *Jackson, supra,* 419 U.S. at 352, 95 S.Ct. at 454, is equally without merit. While it is true that the federal government has engaged in substantial funding of scientific research, such research is by no means within the exclusive domain of government. Further, the mere fact that Cohen worked at Harvard on research in which the public might be interested does not transmute Harvard's employment decision into federal government action.

Because Harvard's action cannot be attributed to the federal government, Cohen has no cause of action under the First and Fifth Amendments. Counts I and II of his amended complaint must, therefore, be dismissed.

IV.

Counts III and IV of Dr. Cohen's amended complaint allege state law causes of action pendent to the federal claims. Under some circumstances, the court may have the discretion to retain pendent state law claims even though all federal claims are dismissed. *See Rosado* v. *Wyman,* 397 U.S. 397, 404-5, 90 S.Ct. 1207, 1213-14, 25 L.Ed.2d 442 (1969). There is no compelling reason to do so in this case, however.[4]

[4] Counts III and IV of Cohen's amended complaint, alleging contract and tort causes of action, were first brought in the amendment to the original complaint allowed by the court on February 14, 1983. They have involved little of the court's time and so their retention would not serve the interests of judicial economy. Under these circumstances, dismissal of the pendent claims is appropriate. *See Jones* v. *Taibbi,* 508 F. Supp. 1069, 1074 (D. Mass.), *cert. denied,* 454 U.S. 1085, 102 S.Ct. 643, 70 L.Ed.2d 620 (1981).

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 83-1670

PHIN COHEN, M.D.

Plaintiff, Appellant,

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE, *et al.*

Defendants, Appellees.

Before Coffin, *Circuit Judge,*
Gignoux, *Senior District Judge,*
and Zobel, *District Judge*

ORDER OF COURT

Entered: April 20, 1984

Upon consideration of "petition for Rehearing and Suggestion for Rehearing En Banc" which document was submitted to the members of the panel and to the judges of the Court who are in regular active service; and

The judges of the panel having Voted to deny the petition for rehearing, and the judges of the Court who are in regular active service having Voted against rehearing en banc.

It is ordered that said application for hearing en banc is hereby denied.

By the Court:

Francis P. Scigliano
Clerk

APPENDIX D

Boston Globe, October 29, 1983

Harvard to repay government $4.6m

Harvard University yesterday agreed to repay $4.6 million to the federal government in settlement of charges that research funds were mismanaged by the Medical School and the School of Public Health.

The settlement, concluding a longstanding audit dispute between Harvard and the US Department of Health and Human Services (HHS), covers the $850.6 million in grants received by Harvard over the past 10 years and wipes out all past claims against the university as well.

Harvard plans to repay $1 million to the federal Treasury immediately and will settle the balance by excusing $3.6 million in debts it is owed by HHS, a university spokesman said.

The federal audit uncovered no evidence of fraud or abuse, said Thomas O'Brien, Harvard vice president for finance. O'Brien said the audit centered on findings that professors controlling several grants incorrectly transferred research funds from one project to another without proper documentation.

"Repayment was necessary even though there was no finding by the audits that the funds were diverted from legitimate research purposes," O'Brien said, adding, "our faculties have met their responsibilities to the government with a high level of integrity."

As part of the settlement, HHS plans to review the cost-accounting improvements the university said it had initiated in the wake of the audits.

HHS also is auditing research grants received by 38 other universities across the country.

– NICK KING

42 The Boston Sunday Globe February 19, 1984

US to ask Harvard to return more grant money

By Gino Del Guercio
United Press International

The US Health and Human Services Department will ask Harvard University to return an additional $400,000 to $500,000 in federal grants in connection with a seven-year investigation into the school's management of research grants, regional officials said.

HHS officials said the money, which now totals close to $5 million, is the largest request for repayment from a university in the history of the agency.

This part of the request, which was separated from the original settlement for $4.6 million, came from an audit of the University's School of Public Health.

Edward Parijian, director of the HHS New England audit division, said the request must still be negotiated with the university, but that he expected it to be resolved by the Feb. 28 deadline for repayment of the entire request.

Thomas O'Brien, Harvard's vice president of finance, and his assistant, A. Simone Reagor, who has been following the case, said they knew nothing of the additional request.

During the HHS investigation of the School of Public Health and Harvard Medical School, auditors found funds were routinely transferred from one project to another to cover cost overrruns and to ensure that all available grant money was spent, officials said.

Audits found evidence of $3.8 million in improper charges as well as tens of millions of dollars in charges that could not be verified because of inadequate documentation, they said.

Charges of misuse of university funds were first leveled in 1975 by Dr. Phin Cohen, formerly an assistant professor of nutrition at the School of Public Health. He accused the school of diverting funds from his National Institutes of Health grant to other unrelated projects. The National Institutes of Health are a division of the HHS.

Institute auditors confirmed Cohen's accusations. Harvard was required to return $132,000. The controversy stimulated the full-scale HHS audit.

Cohen said he was fired from his position a year later for exposing the grant mismanagement.

O'Brien and Reagor downplayed the request's significance. "This is an old issue," said O'Brien.

Reagor, Harvard's director for research administration, said the dispute is simply "a disagreement over what is required in the way of documentation. In general the government requires a high level of detail of documentation. Nowhere is there any indication of any misspending of funds.

Reagor said that although the settlement was large, the actual percentage was very low. "As I remember, it worked out to be as if you had $100 to spend over 10 years and you were unable to document 50 cents," she said.

"As far as we're concerned we don't owe them anything," she said.

Cohen said, "The result of this audit confirms my original allegations of grants mismanagement by Harvard University.